UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

MIKE-SELL'S POTATO CHIP CO.

and Case No. 09-CA-184215

GENERAL TRUCK DRIVERS, WAREHOUSEMEN, HELPERS, SALES AND SERVICE, AND CASINO EMPLOYEES, TEAMSTERS LOCAL UNION NO. 957

RESPONDENT'S EXCEPTIONS TO THE SUPPLEMENTAL DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ANDREW S. GOLLIN AND COMBINED BRIEF IN SUPPORT OF EXCEPTIONS

Respectfully submitted,

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("NLRB"), Respondent Mike-sell's Potato Chip Co. ("Respondent," "Mike-sell's," or "Company") hereby files Exceptions to the Supplemental Decision and Recommended Order ("Supplemental Decision") of Administrative Law Judge Andrew S. Gollin ("ALJ Gollin"), issued in the above-styled case on December 27, 2018. *See* JD-85-18. The grounds for these Exceptions are set forth in the Brief in Support of Exceptions that is combined with and incorporated into this filing.

EXCEPTIONS

1. **Supplemental Decision Page 4, Lines 37-38:** "Thus, an employer remains obligated to bargain upon request even where unilateral action is permitted under a past practice . . . ."[1]

2. **Supplemental Decision Page 5, Lines 6-9:** "It found the company had an established past practice of unilaterally implementing the announced changes in January of every year from 2001 to 2012, and those changes included, without exception, increases in premiums, changes in available benefits, medical options, deductibles, and copayments."[2]

3. **Supplemental Decision Page 6, Lines 2-4:** "Respondent denied violating any provisions of the parties' expired agreement and stated that it had the prerogative to sell the routes under the Paolucci decision."[3]

[1] As explained in its combined Brief in Support of Exceptions, Respondent excepts to this finding to the extent it implies that a union may demand bargaining over specific decisions already made pursuant to a binding past practice, as opposed to demanding to bargain over the general subject prospectively, before any additional decisions are made in accordance with the established past practice.

[2] Respondent excepts to this finding to the extent it suggests that, in *Raytheon Network Centric Systems,* 365 NLRB No. 161 (Dec. 15, 2017), the employer made all the specified changes each and every year "without exception," as well as to the extent it suggests that the specified terms represent an exhaustive list of all types of changes ever made.

[3] Respondent excepts to this finding to the extent it implies Mike-sell's contended the Paolucci decision is what gave the Company the right to sell routes. At all times, Mike-sell's has referenced its preexisting rights "as recognized by Arbitrator Paolucci." (*See, e.g.,* JX-___ (emphasis added).)

4. **Supplemental Decision Page 6, Lines 4-5:** "The Union made no demand to bargain because no routes had been selected at that time."[4]

5. **Supplemental Decision Page 7, Lines 17-18:** "Wilson believed Respondent notified the Union regarding the sale."[5]

6. **Supplemental Decision Page 7, Footnote 8:** "Wilson testified that it 'would have been' vice president of marketing Nat Chandler that notified the Union."[6]

7. **Supplemental Decision Page 7, Lines 23-24:** "Respondent notified the Union that it was closing the center and eliminating its four company sales routes."

8. **Supplemental Decision Page 10, Lines 6-9:** "On September 26, 2012, Arbitrator Paolucci issued his decision, holding that absent clear contractual language, the management rights provision gave Respondent the right to control distribution and determine profitability, which included the right to sell the unprofitable Marion route to a third party."[7]

9. **Supplemental Decision Page 11, Lines 4-7:** "On October 10, 2012, on the first day of bargaining over a successor contract, Respondent informed the Union that it intended to sell 29 company sales routes in Columbus, Sabina, and Cincinnati, Ohio, effective November 18, 2012, because of Respondent's 'dire' financial situation."[8]

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[4] Respondent excepts to this finding because it misconstrues the testimony to reach a conclusion unsupported by the evidence. Respondent further excepts to this finding to the extent indicated hereinafter, as well as in its Merits Exceptions and Brief in Support.

[5] Respondent excepts to this finding to the extent it implies that Wilson's testimony was based on speculation when, in fact, it was based on Wilson's own institutional knowledge and experience with Company-Union communications, as well as a specific statement of intent by the Company's Vice President of Sales and Marketing, who said he planned to give the Union notice of the sale.

[6] *See* footnote 5, above.

[7] Respondent excepts to this finding to the extent it is intended as a complete summary of Paolucci's decision and reasoning; to the extent it implies that the applicability of Paolucci's decision depends on the profitability of individual routes; and to the extent it implies that the individual profitability of the Marion route was ever considered outside the context of responding to the Watson Grievance, which specifically alleged the Company was "subcontracting."

[8] Respondent excepts to this finding to the extent it is an incomplete account of Respondent's explanation of the reason for selling the Columbus, Sabina, and Cincinnati routes.

10. **Supplemental Decision Page 11, Lines 7-8:** "Respondent eventually sold these 29 routes to independent distributor Keystone Distributing, Ltd./Buckeye Distributing Company."[9]

11. **Supplemental Decision Page 11, Lines 16-17:** "Respondent did not provide the Union with notice that these routes reverted back or . . . had been, resold to Helm Distributing."

12. **Supplemental Decision Page 11, Lines 23-25:** "The next time Respondent sold a company sales route to an independent distributor was almost three years later, in 2016, when Respondent began selling the four routes at issue."[10]

13. **Supplemental Decision Page 11, Footnote 12:** ". . . . The (re)sales of these routes are distinguishable from the sale of 'company sales routes' because after they reverted back to Respondent, they were not reassigned to, or performed by, unit employees. Instead, the independent distributor (or a third party) continued to operate the route(s) until they were resold to a different independent distributor."

14. **Supplemental Decision Page 11, Lines 29-31:** "Applying *Raytheon*, Respondent must prove that: (1) it had an established past practice of unilaterally selling company sales routes to independent distributors; and (2) the sales at issue in 2016 did not materially vary in kind or degree from that established past practice."[11]

15. **Supplemental Decision Page 11, Lines 31-32:** "Based on the evidence, I find Respondent has failed to meet its burden."

16. **Supplemental Decision Page 11, Lines 32-35:** "First, Respondent has not established that it unilaterally sold company sales routes to independent distributors with such regularity and

[9] Respondent excepts to this finding to the extent the term "eventually" implies that the 29 routes were sold on any date other than November 18, 2012.

[10] Respondent excepts to this finding—and any other finding referenced in these Exceptions—to the extent "company sales routes" references anything other than routes originally serviced by the Company's Sales Drivers. Respondent also excepts to this finding because it excludes the resale of 38 routes that were resold in 2014 and 2015.

[11] *See* footnote 10, above.

frequency that employees could reasonably expect those sales would continue or reoccur on a regular or consistent basis."

17. **Supplemental Decision Page 11, Lines 35-36:** "As the following illustrates, Respondent's prior sales of company sales routes were neither regular nor consistent:[12]

Year	# of Company Sales Routes	Routes Sold
1998-1999	1	Hamersville route
2000	0	
2001	0	
2002	4	Portsmouth routes[14]
2003	0	
2004	0	
2005	0	
2006	1	Muncie route
2007	0	
2008	0	
2009	3	Mansfield, Newark/Granville/Zanesville, and Lancaster/Hocking Hills/Athens routes
2010	0	
2011	3	Lancaster/New Lexington, Newark/Granville/Zanesville, and Marion routes
2012	30	Celina/Coldwater and 29 Columbus, Sabina, and Cincinnati routes
2013	9	5 Greenville and 4 Springfield routes
2014	0	
2015	0	

18. **Supplemental Decision Page 11-12, Footnote 13:** ". . . I make no findings as to whether the notice given was sufficient to trigger the Union's duty to request to bargain or was notice of a *fait accompli*. The record evidence is limited to when notice was given. In response to leading questions, Plummer and Donnell both confirmed the Union received 'advanced notice' of the sales."

19. **Supplemental Decision Page 12, Line 3:** ". . . [T]he circumstances surrounding these sales materially varied in kind and degree."

[12] Respondent excepts to this finding, including its chart, for the same reasons stated in footnote 10, above.

20. **Supplemental Decision Page 13, Lines 3-4:** "In 2006, Respondent sold the Muncie, Indiana route after the unit driver quit and no one else bid to take over her route."[13]

21. **Supplemental Decision Page 13, Lines 4-6:** "In 2012, Respondent sold the 29 routes in Columbus, Sabina, and Cincinnati to Keystone Distributing, Ltd. /Buckeye Distributing Company, because of the company's 'dire' financial situation."[14]

22. **Supplemental Decision Page 13, Lines 6-7:** "Other routes were sold when their assigned distribution center closed (e.g., Greenville)."[15]

23. **Supplemental Decision Page 13, Lines 9-11:** "In 2012, Respondent argued in the Watson arbitration that the Marion route continually lost money, primarily because of the high costs of maintaining the storage bin and delivering the product to a remote area."[16]

24. **Supplemental Decision Page 13, Lines 11-12:** "Arbitrator Paolucci relied upon that evidence and concluded that Respondent had the management right to unilaterally sell unprofitable routes."[17]

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[13] Respondent excepts to this finding to the extent it purports to reflect the reason the route was sold.

[14] *See* footnote 8, above.

[15] Respondent excepts to this finding to the extent it purports to reflect the reason the routes was sold. In fact, the record reflects that the associated distribution centers were closed because the routes based therefrom were sold.

[16] Respondent excepts to this finding to the extent it implies that the individual profitability of the Marion route was ever considered outside the context of responding to the Watson Grievance, which specifically alleged the Company was subcontracting work to owner-operators. (RX-50.) The way the Watson Grievance was framed and presented required Mike-sell's to present a two-prong defense: (1) that the sale of routes does not amount to "subcontracting;" and (2) that even if the sale of routes did amount to subcontracting, the Company was justified in taking such action. (CP-1, pp. 8-16.)) Under arbitral standards, the second prong of this defense required Mike-sell's to explain (among other things) the economic circumstances unique to the Marion route. (CP-1, pp. 11-12 (citing arbitral law related to subcontracting issues).) The Company thus prepared route-specific calculations that it does not ordinarily maintain or undertake to prepare in order to rebut the specific factual allegations and legal theory raised by the Union. Although the financial viability of the Marion route was certainly affected by the costs of a rented storage bin (CP-1, pp. 5, 9, 12), there were also many other considerations, as it is undisputed that the Marion route was one of the best performing of all. (R. Tr. 153, 186-87, 202-03, 201-11; RX-43, p. 4.) There is absolutely no evidence that Mike-sell selectively chose to sell the Marion route because it was individually unprofitable. (R. Tr. 202-03, 212-13.)

[17] Respondent excepts to this finding because it is an incomplete and misleading summary of Paolucci's decision and reasoning, and it implies that the applicability of Paolucci's decision depends on the profitability of individual routes.

25. **Supplemental Decision Page 13, Lines 12-13:** "Respondent later relied upon the Paolucci decision when it sold the 2016 routes."[18]

26. **Supplemental Decision Page 13, Lines 13-14:** "But I find the sale of the Marion route is distinguishable."

27. **Supplemental Decision Page 13, Lines 14-17:** "Unlike the Marion route, Route 102 (Xenia) received its product directly from the Dayton distribution center, which was about 15 miles away, and there was no evidence presented, or argument made, to the Union that Respondent was selling the route because it was continually losing money."[19]

28. **Supplemental Decision Page 13, Line 17:** "The same is true regarding the other three routes sold in 2016."[20]

29. **Supplemental Decision Page 13, Lines 19-22:** "Respondent has argued that individual route profitability was never a factor in its decisions to sell any of the four routes at issue in 2016," and "[a]s such, the sales in 2016 materially varied in kind and degree from the prior sales."

30. **Supplemental Decision Page 13, Footnote 15:** "Plummer testified that Respondent sold all the routes between 2002 and 2013 based on: (1) overall company profitability; (2) profitability of the company's route sales division; and (3) the company's desire to move away from distribution and focus on manufacturing. Plummer's testimony on this point appeared rehearsed; he gave the same rote, seemingly scripted response eight separate times when asked how Respondent determined which routes to sell. . . . In fact, he gave this same stock response regarding why Respondent decided

[18] *See* footnote 3, above.

[19] Respondent excepts to this finding to the extent it implies that Route 102 did not receive product from the Indianapolis plant; that Respondent was required to give the Union a reason for selling Route 102; that Respondent never gave the Union a reason for selling Route 102; and that there is any evidence Respondent tracked profitability for individual routes.

[20] Respondent excepts to this finding to the extent it implies that Routes 104, 122, and 131 did not receive product from the Indianapolis plant; that Respondent was required to give the Union a reason for selling said routes; that Respondent never gave the Union a reason for selling said routes; and that there is any evidence that Respondent ever tracked the profitability of individual routes.

to sell the Muncie route, even though the evidence establishes Respondent sold the Muncie route only after the assigned driver quit and no one bid to take it over. Furthermore, Respondent offered no documentary evidence (e.g., correspondence, planning documents, meeting notes, etc.) that this was how or why it sold these routes, which is remarkable considering the Respondent's argument that the sales were part of a greater initiative to shift the corporate focus away from distribution toward manufacturing. Finally, Stephen Connell [sic], a former Union steward . . . was called by Respondent to testify about his experiences receiving notice from Respondent that it was selling company sales routes. According to Connell [sic], Respondent never mentioned that its route sales division was not profitable, or that it wanted to move away from distribution and focus more on manufacturing."

31. **Supplemental Decision Page 13, Lines 24-25:** "In light of the foregoing, I find Respondent failed to prove an established past practice and/or that the unilateral sale of Route 102 was mere continuation of the status quo."

32. **Supplemental Decision Page 13, Lines 25-28:** "I, therefore, maintain my prior findings and conclusions that these sales constituted changes to mandatory subjects of bargaining, which Respondent made without affording the Union prior notice and an opportunity to bargain, in violation of Section 8(a)(5) and (1) of the Act."

33. **Supplemental Decision Page 14, Lines 7-9:** "On August 31, 2016, the Union, through business representative Alan Weeks, sent Respondent a letter disputing Respondent's claim that the Paolucci arbitration decision gave it the right to sell Routes 104 and 122."[21]

34. **Supplemental Decision Page 14, Lines 9-12:** "Specifically, the Union argued that Arbitrator Paolucci found no obligation to bargain based on the unprofitability of the route caused by

[21] *See* footnote 3, above.

the cost of providing product to that remote location, and the fact that similar unprofitable routes have been sold in the past."[22]

35. **Supplemental Decision Page 14, Lines 16-17:** "Based on these factors, the Union demanded Respondent meet and bargain over the decision to sell Routes 104 and 122."

36. **Supplemental Decision Page 15, Lines 22-25:** "The *Raytheon* majority made clear that its holding did not alter an employer's statutory obligation to bargain, upon request, regarding a mandatory subject of bargaining, and the existence of an established past practice does not permit the employer to refuse to bargain over the subject if requested to do so by the union."[23]

37. **Supplemental Decision Page 15, Footnote 16:** "In *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), the Board majority held that 'a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all times.' *Id.* at 609 (citing to *Ciba-Geigy Pharm. Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983))." In *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969) enfg. 166 NLRB 831 (1968) the Court of Appeals held that: [I]t is not true that a right once waived under the Act is lost forever. . . . Each time the bargainable incident occurs . . . [the] Union has the election of requesting negotiations or not. An opportunity once rejected does not result in a permanent 'close out" . . . ."[24]

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[22] Respondent excepts to this finding to the extent it implies the existence of any evidence that individual routes "sold in the past" were unprofitable or that their profitability was even tracked on an individual route-by-route basis.

[23] *See* footnote 1, above.

[24] *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), and *NLRB v. Miller Brewing Co.*, 408 F.2d 12 (9th Cir. 1969) enfg. 166 NLRB 831 (1968), are entirely irrelevant. Mike-sell's does not claim that the Union's acquiescence in previous unilateral sales operates as a waiver of its right to bargain over the Company's practice of selling routes "for all time." And Mike-sell's does not dispute the Union's right to request bargaining over the Company's established past practice of selling routes to independent distributors. Rather, Mike-sell's contends that—prior to the 2016 sales at issue—the Union did not request bargaining over the Company's practice of selling routes; the Union merely sought an isolated "exception" for the sale of two specific routes (i.e., Routes 104 and 122). For reasons explained hereinafter, the Union's request to bargain over the decision to sell an individual route—rather than the general practice of selling routes—was not enough to trigger the duty to bargain over the entire practice.

38. **Supplemental Decision Page 15, Lines 25-27:** "Respondent, therefore, cannot rely upon its alleged past practice—which it has failed to establish—as a defense for refusing the Union's request to bargain over the sales at issue."

39. **Supplemental Decision Page 15, Lines 27-28:** "And, for the reasons set forth in my Initial Decision (sans any reliance on *DuPont 2016*), Respondent has failed to establish waiver."

40. **Supplemental Decision Page 15, Lines 30-34:** "In this case, the management rights provision relied upon in the Paolucci decision expired and, as previously stated, even if Respondent had established a past practice of selling company sales routes without objection or requests for decisional bargaining by the Union, that does not constitute a waiver of the Union's right to bargain over the sale of the routes at issue."

41. **Supplemental Decision Page 15, Lines 34-36:** "I, therefore, conclude Respondent had an obligation to bargain, upon request, over the decisions to sell Routes 104 and 122, and it violated Section 8(a)(5) and (1) of the Act when it refused the Union's request to do so."

42. **Supplemental Decision Page 15, Lines 36-38:** "Respondent also violated Section 8(a)(5) and (1) of the Act when it failed or refused to provide the Union with the information requested in the Union's August 31, 2016 letter and demand to bargain."[25]

43. **Supplemental Decision Page 16, Lines 9-10:** "[Route 131] was eventually sold to Big TMT Enterprize, LLC."[26]

44. **Supplemental Decision Page 16, Lines 17-22:** "[T]he Union's failure to request bargaining . . . is excused because Respondent announced the sale of Route 131 as a *fait accompli*. The cited evidence—not the least of which is Respondent's September 12, 2016 response to the

[25] In addition to the arguments set forth herein, Respondent excepts to this finding to the extent indicated in its Merits Exceptions and Brief in Support.

[26] Respondent excepts to this finding to the extent the term "eventually" implies that Route 131 was sold on any date other than September 17, 2016.

Union's information request—establishes Respondent had a fixed intent and was not willing to bargain over the decision to sell this, or any other, route."

45. **Supplemental Decision Page 16, Lines 22-24:** "Again, for the reasons set forth in my Initial Decision (sans any reliance on *DuPont 2016*), and for the reasons stated above regarding the sales of Routes 104 and 122, I find that Respondent's other waiver arguments fail."[27]

46. **Supplemental Decision Page 16, Lines 24-26:** ". . . Respondent also violated Section 8(a)(5) and (1) of the Act when it refused the Union's request to bargain over the decision to sell Route 131."

47. **Supplemental Decision Page 16, Line 46 to Page 17, Line 2-5:** "Respondent has violated Section 8(a)(5) and (1) of the Act since July 2016 by failing and/or refusing to bargain with the Union about its decision to subcontract bargaining unit work from unit employees to others outside the bargaining unit when it sold Routes 102, 104, 122, and 131; and by failing to provide the Union information requested on August 31, 2016, that is relevant and necessary to its role as collective-bargaining representative. By this conduct Respondent has engaged in unfair labor practices affecting commerce within the meaning [sic] Section 2(6) and (7) of the Act."

48. **Supplemental Decision Page 17, Line 7:** "Respondent has not violated the Act except as set forth above."

49. **Supplemental Decision Page 17, Lines 11-35:** The entirety of the ALJ's Remedy, including but not limited to the following:

a. **Supplemental Decision Page 17, Lines 13-14:** "Affirmatively, Respondent shall, upon request from the Union, rescind the sales of Routes 102, 104, 122, and 131."

[27] In addition to the arguments set forth herein, Respondent excepts to this finding to the extent indicated in its Merits Exceptions and Brief in Support.

b. **Supplemental Decision Page 17, Lines 22-23:** "The Respondent shall provide the Union with the information requested in its August 31, 2016 information request."

50. **Supplemental Decision Page 17, Lines 40-43 through Decision Page 19, Lines 1-12:** The entirety of the ALJ's Recommended Order, including but not limited to the following:

a. **Supplemental Decision Page 17, Lines 40-43 through Decision Page 18, Lines 1, 14-16:** "Respondent . . . shall . . . [c]ease and desist from . . . [f]ailing or refusing to provide the Union with . . . the Information requested in the Union's August 31, 2016, information request that is relevant and necessary to the Union's role as collective-bargaining representative."

b. **Supplemental Decision Page 17, Lines 40-43 through Decision Page 18, Lines 21, 27-28:** "Respondent . . . shall . . . [t]ake the following affirmative action necessary to effectuate the policies of the Act . . . [u]pon request from the Union, rescind the sales of Routes 102, 104, 122, and 131 to independent distributors."

51. **Supplemental Decision at Appendix:** The entirety of the Notice to Employees, including but not limited to the following affirmative statements:

a. **Appendix Page 1:** "WE WILL if requested by the Union, rescind the sales of our Ohio Routes 102, 104, 122, and 131 that we made without bargaining with the Union and assign those routes to unit employees."

b. **Appendix Page 2:** "WE WILL promptly furnish the Union with the following information requested in its August 29, 2016, information request letter: (1) documents showing the profitability of Respondent's routes for the period September 1, 2014, through August 1, 2016, so a comparison could be made between all of the routes to Routes 104 and 122; (2) a copy of the agreement between Respondent and the entity who is scheduled to purchase these routes; (3) a description of how Respondent's product is to be received by the entities purchasing these routes; and

(4) a copy of all correspondence between Respondent and the entity who is scheduled to purchase these routes."

52. **Supplemental Decision, in general:** The ALJ's rejection of Respondent's proffered Exhibits 53 and 54, which can be found in the "Rejected Exhibits" file.

BRIEF IN SUPPORT OF EXCEPTIONS[28]

I. CASE HISTORY

This case arises from an Amended Complaint and Notice of Hearing ("Amended Complaint") issued based on a second amended unfair labor practice charge filed by the International Brotherhood of Teamsters, Local Union No. 957 ("Union"), alleging Mike-Sell's violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA"). A remand hearing occurred before ALJ Gollin on November 19, 2018, the sole purpose of which was to consider additional evidence on the Company's alternative defense that—assuming the decision to sell routes is a mandatory bargaining subject—its sale of four routes in 2016 was consistent with an established past practice of unilaterally eliminating routes through sales to independent distributors (hereinafter "distributors").[29] As shown herein, the Company's actions were consistent with *Raytheon Network Centric Systems,* 365 NLRB No. 161 (Dec. 15, 2017), so the Supplemental Decision should be vacated in its entirety.

A. History of Contractual Language

From November 17, 2008, through November 17, 2012, Mike-sell's and the Union were parties to a labor agreement ("Expired Contract") that governed the terms and conditions of employment for Route Sales Drivers ("Sales Drivers") and Over-the-Road Drivers ("OTR Drivers").

[28]Joint Exhibits, General Counsel Exhibits, Charging Party Exhibits, and Respondent Exhibits are parenthetically referenced as "JX-___," "GC-___," "CP-___," and "RX-___," respectively. The Merits Hearing Transcript and the Remand Hearing Transcript are parenthetically referenced as "M. Tr. ___" and "R. Tr. ___," respectively.

[29] Mike-sell's maintains its position that the elimination and sale of individual routes—like the closure of discrete business units—is not a mandatory subject of bargaining. Nevertheless, in the alternative, the Company contends its sale of routes in 2016 did not constitute a "material, substantial, and significant change" to Sales Drivers' terms of employment.

(JX-1.) The following language in ARTICLE XIX, SECTION 1 of the Expired Contract is identical to that in at least three prior labor agreements, including the agreement in effect from October 5, 1997, until October 6, 2001 ("1997 Agreement"); the agreement that was in effect from October 7, 2001, until October 1, 2005 ("2001 Agreement"); and the agreement that was in effect from October 10, 2005, until October 4, 2008 ("2005 Agreement"):

ARTICLE XIX
MANAGEMENT RIGHTS

Section 1. Management of the plant and the direction of the working force, including the right to hire, promote, suspend for just cause, disciplin[e] for just cause, discharge for just cause, transfer employees and to establish new job classifications, to relieve employees of duty because of . . . economic reasons, or other reasons beyond the control of the Company, the right to improve . . . operations, and conditions and distribution of its products, the right to maintain . . . efficiency of employees is exclusively reserved to the Company. It is understood . . . that this authority shall not be used . . . for the purpose of discrimination against any employee because of their membership in the Union, and that no provision of this paragraph shall . . . interfere with, abrogate, or be in conflict with any rights conferred . . . by any other clause contained in this Agreement, all of which are subject to the grievance procedure.

(JX-1, p. 30; RX-44, p. 21; RX-45, pp. 21-22; RX-46, p. 24.)

With one immaterial exception,[30] the following language in ARTICLE VIII-B, SECTION 5 of the Expired Contract is identical to that in at least three prior labor agreements, including the 1997 Agreement, the 2001 Agreement, and the 2005 Agreement:

ARTICLE VIII-B
ROUTE BIDDING

* * *

Section 5. In the event that it becomes necessary to eliminate a route or combine one route with another, employees affected shall have the right to displace a less senior employee. However, displacements shall be restricted to the employees' service location.

(R. Tr. 38-40, 188-89; JX-1, pp. 16-17; RX-44, p. 11; RX-45, p. 11; RX-46, p. 12.)

[30] Throughout the parties' past four labor agreements, the only change to ARTICLE VIII-B, SECTION 5 occurred upon ratification of the 2001 Agreement, when a bumping restriction was eliminated as follows: "However, displacements shall be restricted to the employee's service location ~~and limited to three (3) successive bumps before assignment~~." (R. Tr. 40-42; *compare* RX-44, p. 11 *with* RX-45, p. 11.) This minor revision has no bearing on the instant dispute.

B. History of Distribution Centers and Manufacturing Plants

Sales Drivers have historically been assigned to a Company-operated Distribution Center ("DC"), each serving as "home base" for different routes and maintaining separate seniority lists. (JX-1, pp. 11, 14, 17; RX-44, pp. 6, 8-9, 11; RX-45, pp. 6, 9, 11; RX-46, pp. 7, 10, 12.) Sales Drivers bid on their preferred routes based on their seniority at the DC in which they work. At the height of the Company's in-house distribution efforts, Mike-sell's had almost a dozen DCs staffed by Union-represented Sales Drivers, including DCs in New Paris, Indiana;[31] Versailles, Ohio; Hamersville, Ohio; Portsmouth, Ohio; Cincinnati, Ohio; Sabina, Ohio; Columbus, Ohio; Springfield, Ohio; Greenville, Ohio; and Dayton, Ohio. (R. Tr. 36-37, 65, 68.) Notably, only the Dayton, Cincinnati, and Columbus DCs employed warehouse workers to assist Sales Drivers and OTR Drivers with loading and unloading product. (R. Tr. 86-87.) Some DCs—including Sabina, Columbus, Springfield, and Dayton—operated within and upon Company-owned buildings and property, whereas the rest operated from leased facilities. (R. Tr. 37, 122, 220-21.) As Mike-sell's sold off more routes, it also closed more and more DCs and sold any Company-owned buildings, property, and assets associated with them. (R. Tr. 123.)

Mike-sell's has historically operated two manufacturing plants: one located at 333 Leo Street, Dayton, Ohio; and one located at 5767 Dividend Road, Indianapolis, Indiana.[32] The Dayton plant produces ***only*** potato chips, which are transported to ***all*** Company DCs—including the Dayton DC—

[31] In early 1990, shortly after the Company built its Greenville DC, Mike-sell's closed its New Paris DC. (R. Tr. 37, 67-68.) All New Paris routes were absorbed by the new Greenville DC, including one route in Muncie, Indiana (which will be discussed later). (R. Tr. 37, 321.) Mike-sell's verbally notified the Union of its decision to close the New Paris DC and offered to bargain over any effects, although no drivers were displaced. (R. Tr. 73.)

[32] *See* Ohio Secretary of State Filings at www.businesssearch.sos.state.oh.us (accessed Dec. 17, 2018) *and* Indiana Secretary of State Filings at www.bsd.sos.in.gov (accessed Dec. 17, 2018).

by OTR Drivers.[33] (M. Tr. 232-33; R. Tr. 87-88, 107, 220-21.) The Indianapolis plant produces ***only*** puff corn and cheese curls (i.e., extruded corn products), which are transported to the Dayton DC, as well as other Company DCs, by OTR Drivers.[34] (M. Tr. 232-33, 722-23, 1038; R. Tr. 107, 220-21; *see also* JX-1, pp. 9, 36 (explaining Indianapolis procedures for OTR Drivers and identifying extruded corn products as among those distributed by Sales Drivers).) In addition, a separate Indianapolis business, known as Pretzels, Inc., manufactures all Mike-sell's pretzel products, which are transported to the Dayton DC, as well as other Company DCs, by OTR Drivers. (M. Tr. 1038-39; JX-1, p. 9.) Thus, it undisputed that ***all*** DCs—including the Dayton DC—have depended on OTR Drivers to deliver some or all of their inventory from another location. (R. Tr. 107.)

C. History of Parties' Communications

Since the outset of their relationship, Mike-sell's and the Union have communicated regularly about the terms and conditions of employment for Sales Drivers and OTR Drivers. The unrebutted evidence reflects a protocol whereby Mike-sell's management generally informed the Union Steward of each DC about matters affecting unit employees at that DC.[35] (R. Tr. 124-25, 218-19.) For issues

[33] Although the Dayton DC is near the Dayton plant, it is still a separate facility that requires OTR Drivers to deliver product from the plant in large semi tractor-trailers. (R. Tr. 107; *see* JX-1, p. 25 (allowing warehouse workers to shift tractor-trailers within the plant yard but prohibiting warehouse workers from driving tractor-trailers from the Dayton plant to the Dayton DC).) The Dayton plant is located at 333 Leo Street, Dayton, Ohio, whereas the Dayton DC is located at 1610 Stanley Avenue, Dayton, Ohio, which is more than half a mile drive according to Mapquest. *See* www.mapquest.com/directions/list/1/us/oh/dayton/45404-1115/1610-stanley-ave-39.786414,-84.191262/to/us/oh/dayton/45404-1007/333-leo-st-39.782619,-84.192205 (accessed Dec. 17, 2018).

[34] *See* Katz, Marc, *Mike-sell's Celebrating 100 Years of Potato Chips*, Dayton Daily News (May 16, 2010), available at www.daytondailynews.com/business/mike-sell-celebrating-100-years-potato-chips/w8zQG1kogd4lvcm96eV73K/ (accessed Dec. 17, 2018); Robertson, Amelia, *The Secrets Behind Mike-sell's*, Dayton.com (June 24, 2015), available at www.dayton.com/blog/seen-and-overheard/the-secrets-behind-mikesell/kaqO8qIKZxyFXkJZTxUAOI/ (accessed Dec. 17, 2018).

[35] Each DC Union Steward was responsible for representing local unit employees at that DC, including those who wanted to file grievances or raise concerns about potential contract violations. (R. Tr. 172-74; JX-1, p. 20.) Each DC Union Steward also served on the Union Negotiating Committee and actively participated in bargaining the parties' labor agreements. (R. Tr. 173-75; JX-1, p. 31.) In performing their duties, Union Stewards interacted with Mike-sell's management on a daily basis to discuss any operational issues or potential problems related to unit employees' terms and conditions of employment. (R. Tr. 174-75.) The Union Stewards also communicated with Union Business Agents about any perceived problems, and based on those internal discussions, they may file grievances or submit information requests to further investigate. (R. Tr. 175-76; JX-1, p. 20.) Grievances may be filed on behalf of an individual employee, or on

involving multiple DCs, or the whole unit, Company management also sometimes talked with the Union Business Agent. The Union never indicated that Mike-sell's was required to communicate with a Union Business Agent or Officer instead of a Union Steward. (R. Tr. 27-28, 124, 176-77.)

D. History of Selling Routes

In the early- to mid-1990s, Mike-sell's closed its Hamersville DC and Versailles DC because their operations were unprofitable. (R. Tr. 37, 44, 110.) All Versailles routes were absorbed by the new Greenville DC, just as the New Paris routes,[36] so no drivers were displaced. (R. Tr. 37, 67-68, 73.) As for the Hamersville routes, one was absorbed by the Cincinnati DC, and the other was sold to a distributor, leaving one driver displaced. (R. Tr. 37-38, 44-45, 48-49, 102-03, 110-11.) Mike-sell's verbally told the Cincinnati Union Steward of its decisions to close the Hamersville and Versailles DCs, to absorb most of the routes into other Company DCs, and to sell one Hamersville route to a distributor.[37] (R. Tr. 49-50, 75-76, 90, 109.) Mike-sell's made all of these decisions unilaterally, without bargaining. (R. Tr. 50-51.) The Union did not object to the decisions, made no demand for decisional or effects bargaining, submitted no information request for justification of the decisions, and filed no grievance or unfair labor practice charges. (R. Tr. 51.)

In October 2002, Mike-sell's decided to close the Portsmouth DC and sell the geographic territory that had formerly comprised the four Portsmouth routes to a distributor,[38] Kenneth Bartley

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behalf of a class of employees. (R. Tr. 216.) It is undisputed that the Union does not need an employee's permission to file a grievance to challenge an alleged contract violation; the Union has the independent discretion and authority to file contractual grievances even against an employee's wishes. (R. Tr. 215.)

[36] *See* footnote 31, above.

[37] The Hamersville and Versailles DCs were too small to have their own Union Stewards, so their Sales Drivers were represented by the Cincinnati DC Union Steward. (R. Tr. 88.)

[38] After a sale of routes is fully consummated, the former in-house route numbers/identifiers are no longer meaningful, as the sales territory is no longer referenced separately as—for example—"Routes 1, 2, and 3;" it is instead referenced as a whole, such as "the Portsmouth area" or "the Portsmouth territory." (R. Tr. 70.)

("Bartley").[39] (R. Tr. 37-38, 52-53, 69, 101-02, 122-23, 127-29.) This action was taken because the entire route sales division was unprofitable, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 129, 231-37.) Mike-sell's verbally notified Union Business Agent Keith Jones—as well as the displaced Sales Drivers—of the decision to close the Portsmouth DC and sell its routes to a distributor.[40] (R. Tr. 54, 70, 73, 76-77, 102, 104-05, 107-08, 128.) Mike-sell's made this decision unilaterally, but offered to bargain over the effects. (R. Tr. 54-55, 130.) The Union did not object to the Company's decision, made no demand for decisional bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 59, 130.) However, the Union did take Mike-sell's up on its offer to bargain over the effects of the Portsmouth route sales, and the parties ultimately agreed that displaced Sales Drivers could bump into another DC and/or accept a severance package. (R. Tr. 38, 55-56, 130; RX-47.) Their effects bargaining was embodied in a Letter of Understanding, which specifically "reserve[d]" the Company's pre-existing "right" to service the Portsmouth territory through other means. (R. Tr. 58-59; RX-47.)

In September 2006, Mike-sell's unilaterally sold one of its Greenville DC routes (i.e., the Muncie route) to Francis Distributing.[41] (R. Tr. 130-32, 254-55; RX-48.) This action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its

[39] Although Bartley purchased most of the territory that formerly comprised the four Portsmouth routes, he did not purchase the exclusive right to service all Mike-sell's customers within that area—just the primary right. (R. Tr. 105-06.) Mike-sell's retained certain accounts in the Portsmouth territory, just as the Company did with regard to the 2016 sales at issue. *See, e.g., Mike-sell's Potato Chip Company*, JD–55–17, pp. 5 (ALJ Gollin, July 25, 2017) (finding that "independent distributors . . . enter into agreements . . . for the primary right to distribute [Mike-sell's] products within a defined geographic territory").

[40] At the time the Union was first notified, Mike-sell's had not yet found a distributor who was both willing and able to purchase the Portsmouth sales territory. (R. Tr. 100.) But the Company was nevertheless up-front with the Union about its intent to sell the Portsmouth routes as soon as a qualified buyer was identified. (R. Tr. 100.)

[41] The Muncie route was formerly part of the DC in New Paris, Indiana, before that DC closed and had its routes absorbed by the Greenville DC. (R. Tr. 37, 321.)

capital and reallocate its assets to manufacturing. (R. Tr. 134-35, 231-37.) Mike-sell's verbally told Greenville Union Steward Jerry Miller ("Miller") of its decision to sell the Muncie route and offered to bargain over the effects, if any.[42] (R. Tr. 134-35.) This notice was given in advance of the sale. (R. Tr. 134.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 136, 255-56.)

In 2009, Mike-sell's made the unilateral decision to sell one of its Columbus DC routes (i.e., the Mansfield route) to a distributor, Snyder's of Berlin. (R. Tr. 136-37, 256-57.) This course of action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 137, 231-37.) Mike-sell's verbally notified Union Steward Harry Donnell ("Donnell") of its decision, explaining that the Company "was looking to sell that particular territory" because it "wanted to move in another direction." (R. Tr. 177-78, 190-91.) This notice was given at least a week in advance of the sale. (R. Tr. 177-78, 190-91.) Union Steward Donnell "wasn't happy about it," and he informed Union Business Agent Michael Maddy ("Maddy"). (R. Tr. 178.) Not only did Mike-sell's not bargain over this decision, but the Company also did not bargain over any effects, as the Expired Contract gave the affected Sales Driver (i.e., Nancy Higginsbothom) the right to bump into another route at the Columbus DC, but she chose to resign instead. (R. Tr. 138, 177-79, 204; JX-1, pp. 16-17.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 138, 179, 257.)

[42] In this instance, no one was affected because the last Sales Driver to cover the Muncie route had already separated (i.e., Christy Hensel), and no other incumbent drivers had bid on the route. (R. Tr. 134-35, 255, 320.)

In 2009, Mike-sell's unilaterally sold two of its Columbus DC routes (i.e., the Newark/Granville/Zanesville route, and the Lancaster/Hocking Hills/Athens route) to a distributor, Ohio Citrus. (R. Tr. 138-40, 179-80, 257-58, 260; RX-49.) This course of action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 140-41, 231-37, 259.) Mike-sell's verbally notified Union Steward Donnell of the decision to sell these two routes. (R. Tr. 180-81.) Union Steward Donnell was "not happy" about the decision, and he informed Union Business Agent Maddy. (R. Tr. 180-81, 209.) This notice was given in advance of the sale, with an explanation that the Company wanted to "divest itself" of the territory. (R. Tr. 180-81.) Mike-sell's bargained neither over this decision nor its effects, as the Expired Contract already set forth bumping rights for the two affected Sales Drivers (i.e., Jim Phillipi and Pat Kenny). (R. Tr. 141, 180-81, 258, 307-08; JX-1, pp. 16-17.) One of the affected Sales Drivers exercised his right to bump into another Columbus DC route, based on his seniority, while the other affected driver chose to resign instead. (R. Tr. 309-10.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 141, 181-82, 209, 260.)

Less than a year later, Ohio Citrus relinquished the two Columbus DC territories purchased in 2009 (i.e., the Newark/Granville/Zanesville route, and the Lancaster/Hocking Hills/Athens route), no longer wanting to service the territory. (R. Tr. 141-42, 182, 260-61.) Mike-sell's re-absorbed the Newark/Granville/Zanesville route and awarded it to a Columbus DC Sales Driver. (R. Tr. 142, 182, 194-95.) But Mike-sell's re-sold the Lancaster/Hocking Hills/Athens route to another distributor, Snyder's of Berlin. (R. Tr. 142-43, 182.) Prior to the sale, Mike-sell's verbally conveyed the Company's unilateral decision to Union Steward Donnell, who was "not pleased" that the Lancaster/Hocking Hills/Athens route would be re-sold. (R. Tr. 182-83.) Still, the Union did not

object to the decision, made no demand for decisional or effects bargaining, submitted no information request, and filed no grievance or unfair labor practice charge. (R. Tr. 143, 183.)

Shortly thereafter, Snyder's of Berlin relinquished the two territories it had previously purchased from the Company (i.e., the Mansfield route, and the Lancaster/Hocking Hills/Athens route), no longer wanting to service them. (R. Tr. 144.) Mike-sell's unilaterally decided not to re-absorb either route, in order to further promote a shift from distribution to manufacturing. (R. Tr. 145.) Thus, both sales territories were largely abandoned, except that the "Lancaster" portion of the Lancaster/Hocking Hills/Athens route was combined with the Company's existing New Lexington route that was serviced by an incumbent Sales Driver at the Columbus DC. (R. Tr. 145.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 146.)

In August 2011, Mike-sell's made the unilateral decision to sell two Columbus DC routes (i.e., the Newark/Granville/Zanesville route, and the Lancaster/New Lexington route) to Buckeye Distributing. (R. Tr. 146-50, 183-84, 189; RX-5.) This action was taken because the entire route sales division was losing money, and Mike-sell's wanted to liquidate its capital and reallocate assets from distribution to manufacturing. (R. Tr. 150, 231-37.) Before the two routes were sold, Mike-sell's verbally notified Union Steward Donnell of the decision to sell them in order to "divest itself of territories that were . . . unproductive." (R. Tr. 184-85.) Union Steward Donnell was "not happy" about the decision, and he informed Union Business Agent Maddy, who commented that Mike-sell's "ke[pt] juggling [the routes] around." (R. Tr. 184-85.) The affected Sales Drivers exercised their contractual right to bump into another route at the Columbus DC, based on their seniority. (R. Tr. 195-96; JX-1, pp. 16-17.) The Union did not object to the Company's decision, made no demand for

decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 150-51, 186.)

Prior to November 2011, no one from the Union ever stated or implied that Mike-sell's must bargain over its practice of selling routes to distributors. (R. Tr. 59-62.) But in November 2011, Mike-sell's unilaterally sold yet another Columbus DC route (i.e., the Marion route) to Buckeye Distributing. (R. Tr. 151-53, 186-87; RX-5.) Although Marion was "one of the higher-performing routes,"[43] Mike-sell's still wanted to sell it because the entire route sales division was unprofitable, and the Company wanted to shift its focus from distribution to manufacturing. (R. Tr. 153, 186-87, 210-11.) In advance of the sale,[44] Mike-sell's verbally notified Union Steward Donnell of the decision to sell the Marion route, explaining that "the Company was looking to sell that territory" because it "was going in a different direction." (R. Tr. 153, 187, 190-94; RX-43, p. 4.) Union Steward Donnell, in turn, informed Union Business Agent Maddy. (R. Tr. 187-88.) The affected Sales Driver, Angie Watson ("Watson"), had the contractual right and the seniority to bump into another route at the Columbus DC. (R. Tr. 186, 223-24, 261; JX-1, pp. 16-17.) She initially exercised her right to bump into another route, but after a few weeks, she resigned. (R. Tr. 186, 261.)

On November 9, 2011, the Union filed a class action grievance "on behalf of all Sales employees" to challenge the sale of the Marion route ("Watson Grievance"). (R. Tr. 154, 261-62; RX-50.) It was signed by Union Business Agent Matty and stated (in relevant part) as follows: "The Company has stated to . . . Watson that her route will be transferred to an independent operator. The Company is in violation of Articles I, II, and VIII of the [Expired Contract]. I request that the

[43] At one point, the Marion route had grown so much in terms of sales volume that it had to be split up into two different routes, with one portion becoming the Mansfield route. (R. Tr. 202-03.) Thus, contrary to the anticipated arguments of the Union and/or the General Counsel, there is absolutely no evidence that Mike-sell's selectively chose to sell the Marion route because it was ***individually*** "losing money" or "not profitable." (R. Tr. 212-13.)

[44] Union Steward Donnell is certain he received notice at least one or two weeks in advance, and according to the Union's own admission, Mike-sell's gave notice "three to four weeks" before the sale occurred. (R. Tr. 190, 193; RX-43, p. 4.)

Company bargain over the decision to transfer this route and work to an independent operator and the effects of the decision prior to taking any action. Further facts to be presented at hearing." (R. Tr. 154, 262; RX-50.) Mike-sell's denied the Watson Grievance, based on its long-standing practice of unilaterally selling routes—a practice to which the Union had never before objected. (R. Tr. 154-55, 158-59, 265-66; RX-50.) The Union did not submit an information request or file an unfair labor practice charge related to the sale of the Marion route. (R. Tr. 267-70.)

In May 2012, Mike-sell's made the unilateral decision to sell one of its Greenville DC routes (i.e., the Celina-Coldwater route) to a distributor, Ryan Young Distributing.[45] (R. Tr. 160-61, 273-74.) This course of action was taken because the entire route sales division was losing money, and the Company wanted to liquidate its capital and reallocate its resources from distribution to manufacturing. (R. Tr. 168-69, 231-37.) In advance of the sale, Mike-sell's verbally notified Union Steward Miller of the decision to sell the Celina-Coldwater route. (R. Tr. 169.) The displaced Sales Driver exercised his contractual right to bump into another route at the Greenville DC, based on his seniority. (R. Tr. 168.) The Union did not object to the Company's decision, made no demand for decisional or effects bargaining, submitted no information request for justification of the decision, and filed no grievance or unfair labor practice charges over the decision. (R. Tr. 169-70.)

On June 27, 2012, the Watson Grievance was arbitrated. (RX-2, pp. 1-2.) Arbitrator Paolucci took sworn testimony from three witnesses: Sales Driver Angie Watson, Mike-sell's Zone Manager Mark Plummer, and Mike-sell's Human Resources Director Sharon Wille. (R. Tr. 238, 284.) During the arbitration, Mike-sell's witnesses confirmed "the Company's position" that it had the right to "take all of its routes currently being performed by bargaining unit members" and sell them to distributors at any time, "without violating any provisions of the [Expired Contract]." (RX-43, p. 9.)

[45] It is undisputed that Mike-sell's and Ryan Young Distributing executed a Bill of Sale and Independent Distributor Agreement governing the sale of the Celina-Coldwater route. (R. Tr. 274-81.)

To support its case, Mike-sell's relied upon the Company's past unilateral decisions to sell routes without objection from the Union, as well as "Article VIII-B – Route Bidding" and "Article XIX – Management Rights" of the Expired Contract. (CP-1.) The Watson Grievance was denied on September 26, 2012, as detailed in what has become known as the "Paolucci Award." (RX-2.)

II. LAW AND ARGUMENT

As an initial matter, the Board has already held that the Company's sale of routes to distributors is a mutually-accepted practice. In *Mike-Sell's Potato Chip Co.*, 360 NLRB 131 (2014), ALJ Carter heard testimony—elicited by the General Counsel from Union Business Agent Michael Maddy ("Maddy") on direct examination—regarding the Paolucci arbitration award, as well as the 29 routes sold in November 2012. Citing this testimony,[46] ALJ Carter found that "Respondent first mentioned its plan to sell the Columbus, Sabina, and Cincinnati routes . . . in the October 10 bargaining session. The parties agree that in light of [Arbitrator Paolucci]'s decision, Respondent was permitted to eliminate (or sell) routes and distribution centers." *Id.* at 142, fn.14 (emphasis added; internal cites omitted). Neither the Union nor the General Counsel excepted to these findings, which were adopted by the Board. The Board should therefore apply its own prior findings in the instant case, particularly where (as explained below) the ALJ's contrary findings are not supported by substantial evidence in the record.[47] *See, e.g.*, *Horizons Hotel Corp.,* 323 NLRB 591 (1997) ("It is well established that the Board will take official notice of its own decisions and . . . a finding in one proceeding on a particular issue may be a basis for making the same finding in a subsequent case.").

[46] Maddy was noticeably absent from the remand hearing before ALJ Gollin in November 2018, as neither the General Counsel nor the Union wanted to elicit his testimony in this case.

[47] "Substantial evidence" is "such 'relevant evidence as a reasonable mind might accept as adequate to support a conclusion' and affords 'a substantial basis of fact from which the fact in issue can be reasonably inferred.'" *NLRB v. Sun Shipbuilding & Dry Dock Co.*, 135 F.2d 15, 25 (3d Cir. 1943). Evidence that is at least equally supportive of inconsistent inferences is not substantial. *Id.* at 27-28.

A. The ALJ erred in finding that the Company's sales of routes were too irregular and infrequent for Sales Drivers to reasonably expect them to reoccur on a consistent basis. (Relates to Exceptions 8-17, 21, 31-32, 38, 43, 47-52)

ALJ Gollin incorrectly found that the Company's 17-year history of selling routes is insufficient to establish a past practice. *See* JD-85-18, p. 11. Mike-sell's presented evidence of almost five dozen routes sold and/or resold between 1998 and 2016. (M. Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2, pp. 7-8; RX-5; RX-6; RX-7; RX-8; RX-9.) A dozen routes were sold/re-sold from mid-2006 to mid-2012. (R. Tr. 130-32, 136-44, 146-53, 160-61, 179-80, 182-84, 186-87, 189, 254-58, 260-61, 273-74; RX-5, RX-48, RX-49.) Nearly four dozen more routes were sold for the first time immediately after the end of the Expired Contract term, two months after the Paolucci Award issued. (M. Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2; RX-5; RX-6; RX-7; RX-9.) It is thus clear that Mike-sell's sold routes to distributors with such regularity and frequency that Sales Drivers could reasonably expect those sales to reoccur on a regular and consistent basis.

Board law confirms the Company's history is sufficient to create a binding past practice. For example, in *Dow Jones and Co., Inc.*, 318 NLRB 574, 588 (1995), the General Counsel alleged the employer had a nationwide past practice of allowing union meetings at its 50+ facilities. The General Counsel presented evidence of union meetings held at only seven locales across the country, without objection, from 1987 through 1990. *Id.* at 579. The Boston facility held the most union meetings—with only three—all which occurred in 1987, at least four years before the alleged unilateral change. The other six locales held even fewer union meetings during the relevant period, and the remaining 40+ facilities held none at all. While the union meetings were "remarkably few in number, sporadic, and isolated,"[48] the Board held that "there existed a consistent corporatewide past practice whereby

[48] Indeed, the ALJ had initially ruled that the evidence "does not establish that the alleged unrestricted past practice existed at *any* unit facility, much less on a broader basis consistent with the multilocation bargaining unit." *Dow Jones and Co., Inc.*, 318 NLRB 574, 579-80 (1995).

the [employer] permitted the union to hold meetings on the [employer]'s facilities without restriction." *Id.* at 576, 579-80. *See also Monroe County Intermediate Sch. Dist.*, 105 LA 565, 567 (Brodsky, 1995) ("[A] practice can be established if, when one circumstance occurs, it is consistently treated in a certain way. The occurrence need not be daily or weekly, or even yearly, but when it happens, a given response to that occurrence always follows.").

Here, as in *Dow Jones*, there exists a "consistent corporatewide past practice" whereby the Company sells routes traditionally-serviced by Sales Drivers to distributors. These sales occurred with far more regularity and frequency—and over a longer period—than did the union meetings in *Dow Jones*. The Union knew Mike-sell's had a practice of unilaterally selling routes—based on Articles VIII-B and XIX of the Expired Contract—with the Union receiving notice of each sale before it occurred. (M. Tr. 303, 305-06, 308, 321, 330, 332, 346, 357, 360; R. Tr. 49-50, 54, 70, 73, 75-77, 90, 102, 104-05, 107-09, 128, 134-35, 153, 169, 177-78, 180-85, 187-88, 190-94, 209; RX 43, pp. 4-9.) The Union never objected to any of the sales until 2011, when the Marion route was sold. (R. Tr. 154, 261-62; RX-50.) The Union disagreed with "the Company's position" that it could "take all of its routes" and sell them to distributors at any time, "without violating any provisions of the [Expired Contract]." (RX-43, p. 9 (emphasis added).) That is exactly why the Union filed the Watson Grievance as a class action grievance, intended to challenge the overall practice of selling routes and to force Mike-sell's to bargain over the decision for every sale. (RX-50.) The broadly-worded Watson Grievance indicates the Union wanted Arbitrator Paolucci to address the practice as a whole—"on behalf of all Sales employees"—in order to resolve the dispute for all time. (RX-50.) Arbitrator Paolucci did as he was asked; the Union just did not like his answer.

After the Paolucci Award issued, Mike-sell's sold over three dozen more routes without objection from the Union. (R. Tr. 49-51, 54, 59, 70, 73, 75-77, 90, 102, 104-05, 107-09, 128, 130, 134-36, 138-39, 141, 143, 146, 150-51, 153, 169-70, 177-87, 190-94, 209, 255-57, 260, 267-70; M.

Tr. 303-04, 317, 330-31, 336-38, 350; RX-1; RX-2; RX-5; RX-6; RX-7; RX-9; RX-43, pp. 4, 9.) As this Board recognized based on the Union's testimony, "[t]he parties agree[d] that . . . Respondent was permitted to eliminate (or sell) routes and distribution centers." *Mike-Sell's*, 360 NLRB at 142, fn.14. In total, from 1998 to 2016, Mike-sell's sold nearly five dozen routes to distributors, giving the Union notice of each sale.[49] This is clearly sufficient to prove a binding practice that arose directly from the parties' bargained-for contract language, so the ALJ should be reversed.

B. The ALJ erred in finding that the 2016 route sales materially varied in kind and degree from the Company's prior sales. (Relates to Exceptions 7-9, 11, 13-16, 19-34, 38, 46-52)

Mike-sell's presented unrebutted evidence-both at the merits and remand hearing—that the Company's decision to sell almost five dozen routes from 1998 through 2016 was motivated by a desire to shift the risk of loss, and invest more in manufacturing, due to the fact that its entire in-house distribution model was unprofitable. (R. Tr. 37, 44, 110, 129, 134-35, 137, 140-41, 150, 153, 186-87, 210-11, 231-37, 259; M. Tr. 151-52, 234-44, 237-38, 243-46, 305, 364, 374, 538-50, 605, 669-70, 834-35, 898, 972; RX-2, pp. 16-19; RX-15; RX-43, p. 9.) Nevertheless, the ALJ held that the sale of Routes 102, 104, 122, and 131 differed from prior sales because they were sold for a different reason. *See* JD-85-18, pp. 12-13.) *See* JD-85-18, p. 13 at fn.15. This finding is directly contrary to the record evidence.

As a threshold matter, neither the Union, the General Counsel, nor the ALJ cited any Board law to suggest that a party's reason for its recurrent actions must be consistent in order to create a binding past practice. Moreover, if the Union cared about the Company's reason for selling off routes, it could have inquired when notified of each sale, or even during the party's contract negotiations.

[49] ALJ Gollin refused to defer to the Paolucci Award's interpretation of Articles VIII-B and XIX of the Expired Contract (i.e., that the sale of routes is one method by which they may be "eliminated"), claiming he is "not bound by an arbitrator's decision." However, "the Board is neither the sole nor the primary source of authority in [contractual disputes]," as "[a]rbitrators and courts are still the principal sources of contract interpretation." *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 202 (1991) (internal cites and quotes omitted).

But there is no evidence the Union ever asked about the Company's reason for selling routes; that the Union believed the reason varied from sale to sale; or that the Union failed to object to certain sales because they were made for an unacceptable reason.

To demonstrate conformity with an established past practice, a party need not show that the underlying reason for its action is exactly the same or that it relied on consistent criteria to make the decision. In *Raytheon*, 365 NLRB at *2, the Board found that the employer did not make any "change" when it unilaterally modified healthcare packages without giving the Union prior notice and opportunity to bargain. There, the changes varied: "some changes were intermittent, while others, such as the portion and amount of health care premiums . . . changed annually." *Id.* (Members Pearce and McFerran, dissenting). These changes were based on "significant discretion":

> Respondent gave its health benefits professionals "free rein to come up with whatever benefits they think is best" for employees. What they came up with and what was unilaterally implemented by the Respondent during the terms of successive contracts from 2001-2012 included increases to employee copayments for emergency room treatment, outpatient surgeries, and specialist visits, as well as increases to deductibles and other out-of-pocket expenses. The Respondent also added plan options, eliminated others, changed eligibility requirements, and merged some plans. Additionally, increases to medical premiums were made every year, without any fixed percentage ratio, starting in 2002 with the Respondent paying 85 percent of the premiums to employees' 15 percent, culminating in a 75 percent to 25 percent employer-to-employee ratio by the end of the 2009-2012 contract.

Id. The ALJ found that premium shares "changed on an ad hoc basis" such that neither employees nor their Union could predict them. *Id.* "[T]there was no formula or criteria for the changes [, and] they could not be explained by the Union to the bargaining unit." *Id.* The ALJ also found that changes to specialist co-pays, emergency room co-pays, and prescription costs were "completely random." *Id.*

Despite stipulations that the employer exercised "significant discretion" in modifying benefits and lacked "definable criteria" in doing so, the *Raytheon* Board found that the healthcare changes did not materially vary in kind or degree from one year to the next. The Board thus held that the changes "constituted a past practice and a term and condition of employment privileging the [employer] to

make further changes in costs and/or benefits." *Id.* at *22. The Board also confirmed that actions do not necessarily constitute a change where they involve "discretion." *Id.* at *20. Rather, "an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion." *Id.*

Similarly, in *Shell Oil Co.*, 149 NLRB 283 (1964), the employer had—"on occasion" and for "some years" prior to the labor agreement expiring—subcontracted work that could be performed by unit employees, without notice to or objection by the union. *Id.* at *290. The employer relied on certain contract language that purportedly gave it the right to subcontract unit work, and further considered whether it possessed the necessary equipment, materials, know-how, and/or manpower to do the job in-house. *Id.* at *290-91. No one was laid off as a result of subcontracts entered prior to the labor agreement's expiration. *Id.* at *291. After the labor agreement expired, the employer kept subcontracting without notice to, or bargaining with, the union, and its post-expiration subcontracts resulted in the layoff of 60 unit employees. *Id.* The union filed an unfair labor practice charge, claiming all post-expiration subcontracts were in violation of the NLRA. *Id.*

The *Shell Oil* Board disagreed, finding the employer's "frequently invoked practice . . . while predicated upon observance and implementation of [the expired contract], had also become an established employment practice . . . ." *Id.* at *287. The post-expiration subcontracts "did not materially vary in kind or degree from what had been customary in the past," despite that the specific work subcontracted, and the reasons therefor, varied significantly. *Id.* at *288, **292-93. For example, the employer subcontracted the following work for the following reasons:

1. clean boiler tubes and drums with acid: time-consuming task, leading to extra "downtime"
2. repair and replace ceramic tile on swimming pool: employees not qualified
3. salvage plants and soil treatments, and add new plants: work was specialized
4. repair sound system in the theater: employees not qualified
5. sandblast and spray storage tank to stop leaks: contractor "guaranteed" the work
6. install acoustic ceiling in main office building: difficult to perform
7. dispose of garbage and trash: kept using "replacement" service even after strike ended

8. install 2300-volt power supply: strike-necessitated, and continued after strike ended
9. install four radar eye units: new equipment with which company had no prior experience
10. haul hydrogen trailers: strike-necessitated
11. miscellaneous construction work: kept using "replacement" service even after strike ended
12. clean distilling unit: time-consuming task, leading to extra "downtime"
13. supply and erect aluminum awning: no reason given for subcontract
14. complete energy recovery system: no reason given for subcontract
15. treat houses and sheds for termites: no reason given for subcontract

Id. at **292-93. Furthermore, "the subcontracting did not occur . . . under conditions precluding the union from invoking collective bargaining with regard to changes in existing practices which . . . had become an established condition of employment." *Id.* at **289-90.

Here, as in *Raytheon* and *Shell Oil*, Mike-sell's necessarily exercised some discretion in deciding which routes to sell and when. But this does not demonstrate a departure from the Company's established past practice. Rather, as Member Miscimarra explained in *DuPont*:

> Take, for example, an employer that has always painted factory walls blue every summer and green every winter. When doing this painting, the employer exercised discretion: it varied the precise shade of blue and green, and it also varied the precise time when the painting would be done. Summer approaches. If the employer again paints the factory walls blue, will that constitute a "change"? In my view, because this is what the employer has always done, it is not a "change" for the employer to do the same thing again.

364 NLRB No. 113, slip op. at 16 (dissent). The Board endorsed this view in *Raytheon*, recognizing that "employers do not just paint walls. They take all kinds of actions, including many that affect wages, hours, benefits, and other employment terms." 365 NLRB No. 161 at *14. Accordingly, "an employer may lawfully take unilateral actions where those actions are similar in kind and degree with what the employer did in the past, even though the challenged actions involved substantial discretion." *Id.* at *20 (emphasis added) (cites omitted).

Even if the Company was required to have the same reason for selling each route in order to create a binding past practice (which it was not), Mike-sell's presented undisputed evidence at both the merits and remand hearing that its decision to sell almost five dozen routes from 1998 through

2013 was motivated by its desire to move away from distribution and focus more on product development and marketing. (R. Tr. 37, 44, 110, 129, 134-35, 137, 140-41, 150, 153, 186-87, 210-11, 231-37, 259; M. Tr. 151-52, 234-44, 237-38, 243-46, 305, 364, 374, 538-50, 605, 669-70, 834-35, 898, 972; RX-2, pp. 16-19; RX-15; RX-43, p. 9.) Mike-sell's also presented evidence that Routes 102, 104, 122, and 131 were all sold for the same reason: to shift the Company's assets and focus from distribution to manufacturing. (M. Tr. 151-52, 234-44, 237-38, 243-46, 305, 364, 374, 538-50, 605, 669-70, 834-35, 898, 972.) The ALJ did not credit the Company's explanation for its sales because he found the direct examination testimony of Zone Manager Mark Plummer ("Plummer") to be "rehearsed" on this point. *See* JD-85-18, p. 13 at fn.15. But the ALJ ignored the plethora of other evidence that corroborated Plummer's testimony about the common reason for the sales.[50]

For example, on cross examination, Plummer was interrogated about the Company's position that its entire in-house distribution model is a losing venture. The Union's counsel repeatedly hounded Plummer about whether the Dayton DC routes were as unprofitable as the routes sold from other DCs. Plummer testified—spontaneously and under pressure—that in making the decision to sell the four Dayton routes in 2016, Mike-sell's was concerned with "the route division profitability," and was focused on "profitability as a whole":

> It's the profitability of the whole -- the whole route system is not profitable. It's not just the volume that's involved here in profitability and not location that's involved here, and I can't quantify that any better than that. . . . The quantification is the whole division as a whole, the whole structure that we're involved in route sales, delivery structure, the DSD distribution structure as a whole was not possible. That's why our

[50] Where the record contains conflicting testimony, "it is the function of the trial examiner to accept or reject, credit or discredit, conflicting versions of factual events and the inferences to be drawn from them." *NLRB v. Longhorn Transfer Serv., Inc.*, 346 F.2d 1003, 1006 (5th Cir. 1965) ("where 'there are two grounds for discharge, one proper and the other unlawful, and the evidence as a whole would make the inferences as to which was the motivating cause reasonably equal, the conclusion reached by the Board should be sustained.'"). But "the duty to find the facts does not carry with it the prerogative of raising suspicion to the status of fact or of basing inferences upon mere speculation." *Sun Shipbuilding*, 135 F.2d at 31. Thus, an ALJ may not make credibility determinations by ignoring material portions of a witness's testimony and/or reaching conclusions unsupported by the evidence. *Id.* at 27 (findings are not supported by substantial evidence where General Counsel's main witness was self-impeached, thus leaving respondent's testimony unrebutted).

> desire is to shift our focus into manufacturing, which is much more profitable. . . . the reason the routes were sold in Dayton [is] because the route sales division on a whole is not profitable. We're not quantifying districts or zones or routes. I'm saying as a whole.

(R. Tr. 234-36.) When asked if the route sales division was still unprofitable after Mike-sell's eliminated all but the Dayton routes, Plummer replied, "[W]e took out all the other areas at the time that this happened, so, yes, of course, the Dayton routes were the only ones left, and so that route sales division was unprofitable. . . . We didn't do it by profitability of routes. It's on a whole." (R. Tr. 236-37.) The ALJ completely ignored Plummer's impromptu cross examination testimony, which was far more extensive than his testimony on direct.

Similarly, former Human Resources Director Sharon Wille ("Wille") testified to the following on direct examination: "Our primary focus is manufacturing. Distribution is an antiquated way to get product to the market because it's too expensive. So we wanted to move the assets away from the distribution side and invest in the manufacturing side so that we could survive as a Company." (R. Tr. 259.) On cross examination, Wille confirmed that, although Mike-sell's chose to sell the Muncie route after no one bid on it, the Company could have filled the route by assigning it to a "skipper."[51] (R. Tr. 320.) This belies the ALJ's suggestion that the Muncie route was sold <u>because</u> no one bid it, rather than in furtherance of the Company's goal to reduce in-house distribution and shift focus to manufacturing. The ALJ completely ignored Wille's testimony, which corroborates that of Plummer.

Moreover, during the merits hearing, Vice President of Sales Phil Kazer ("Kazer") testified at length about the Company's decision to sell routes in order to further its key strategic objective of investing more in manufacturing and branding quality products, which is its biggest strength and most promising area for growth and profitability. (M. Tr. 244, 246.) Kazer testified that Mike-sell's is <u>not</u> interested in growing its route sales division, which has lost money hand-over-fist for more than a

[51] A "skipper" is a Sales Driver who does not have a dedicated route and instead covers the bid routes of other Sales Drivers who are off work for some reason. (M. Tr. 132.)

decade because of the high cost of overhead and high risk of loss. (M. Tr. 237; 244.) Therefore, the Company has gradually reduced its route sales division by selling routes to distributors who buy the product up-front, directly from Mike-sell's—thereby accepting the entire risk of loss. (Mr. Tr. 245.) The ALJ completely ignored Kazer's testimony, which further corroborates that of Plummer.

In any event, neither the General Counsel nor the Union presented any evidence to dispute the Company's stated reason for selling its routes. They merely argue that the 2016 sales vary from past sales "in kind and degree" because Routes 102, 104, 122, and 131 were serviced by Sales Drivers based out of the Dayton DC (as opposed to another DC), and/or because those routes did not require OTR Drivers to deliver product to "remote bin locations."[52] That the routes sold in 2016 were located in Dayton, rather than one of the many other cities in which routes had been sold, does not change the Company's underlying reason for the sales—as Plummer, Wille, and Kazer all testified. Because the ALJ improperly ignored and discredited undisputed testimony presented by Mike-sell's, and because there is no evidence in the record to support the ALJ's alternative finding that the routes were sold for different reasons, this finding should be reversed.

C. The ALJ erred in failing to find that Mike-sell's gave sufficient notice of the sales. (Relates to Exceptions 5-7, 9, 11, 13, 18, 21, 31-32, 38, 44-52)

ALJ Gollin acknowledged that the Company's notice to Union Stewards was sufficient to put the Union on notice of the Company's decision to sell routes to distributors. *See* JD-85-18, pp. 11-12, fn.13. But he made no finding as to whether this notice was "sufficient," or whether it was notice of a *fait accompli*. *Id.* The failure to find appropriate notice is improper for several reasons.

[52] The Union and the General Counsel appear to contend that these facts made Routes 102, 104, 122, and 131 "more profitable" than (and, thus, different from) the routes sold to distributors prior to 2016. Even if true, these distinctions make absolutely no difference to the analysis. It is undisputed that all Sales Drivers and all routes—including those in Dayton—have consistently relied on OTR Drivers to deliver inventory to their DC and/or "bin." (R. Tr. 86-88, 107, 220-21; JX-1, pp. 9, 25, 36.) OTR deliveries were never made exclusively to "remote areas" or "bin locations" outside Dayton. Indeed, OTR Drivers travel much farther to deliver Mike-sell's puff corn, cheese curls, and pretzels from Indianapolis to the Dayton DC than they ever did to deliver product from Dayton to other DCs or "bin locations," such as those in Cincinnati or Columbus. (M. Tr. 232-33, 722-23, 1038-39; R. Tr. 107, 220-21; *see also* JX-1, pp. 9, 36 (explaining Indianapolis process for OTR Drivers and identifying extruded corn products as among those carried by Sales Drivers).)

First and foremost, because the Company's right to sell routes is based on an established past practice arising from long-standing contract language that had already been bargained (and interpreted in arbitration), Mike-sell's had no obligation to give the Union any notice of the sales. *See, e.g., Raytheon,* 365 NLRB at * 2 ("Respondent's modifications in healthcare benefits in 2013 were a continuation of its past practice," so "Respondent did not make any 'change' . . . and . . . it lawfully implemented these modifications without giving the Union prior notice and opportunity to bargain.") Mike-sell's always elected to give notice as a matter of courtesy, in accord with the way it does business. (RX-43, pp. 11-12; JX-5; JX-6; JX-10.) And incidentally, its habit of giving notice further supports the existence of a binding practice by ensuring the Union's awareness of the same. But because the sale of routes had become a term or condition of employment that was part of the status quo, no notice was legally required. *Id.* at *9 (citing *Shell Oil*) (". . . we cannot say that the Respondent's action in subcontracting, according to its established practice, certain unit work without prior notice to or bargaining with the Union during the period when no bargaining agreement was in effect was in derogation of a statutory duty to bargain on terms and conditions of employment").

In any event, Respondent's witnesses testified that the Union received "advance notice" of the Company's decision to sell prior routes, as demonstrated by the following undisputed evidence:

- The Union received months of notice of the Portsmouth routes being sold, as Mike-sell's had not yet found a buyer when severance was negotiated in 2002. (R. Tr. 99-102; RX-47.)
- The Union received at least one or two weeks' notice of the Mansfield and Marion sales in 2009 and 2011, respectively. (R. Tr. 177-78, 190-91.)
- The Union received over a months' notice before the 29 routes in Columbus, Sabina, and Cincinnati were sold in 2012. (M. Tr. 136, 203-03.)
- The Union received two months' notice before the five Greenville routes were sold in 2013. (M. Tr. 317-18.)
- The Union received one months' notice before the four Springfield routes were sold in 2013. (M. Tr. 337-38; RX-8, RX-33.)

- The Union received nine days' notice before Route 102 was sold. (M. Tr. 376; JX-5; RX-10.)
- The Union received four days' notice before Routes 104 and 122 were sold. (M. Tr. 381-82; JX-6; RX-11.)
- The Union got five days' notice before Route 131 was sold. (M. Tr. 406; RX-12; JX-10.)

In sum, of the 55 routes sold to distributors between 1998 and 2016, the record reflects the specific amount of notice given for at least 48 of them. The notice given ranges from four days to several months, so the Union always had enough time to file a grievance and/or demand bargaining. Indeed, the Union did exactly that in two situations where it got some of the least notice: the Marion route sold in 2011 on one week's notice, and the Kettering/Bellbrook/Sugar Creek/Centerville route (Route 104) and the Beavercreek/Kettering route (Route 122) sold in 2016 on just four days' notice. (R. Tr. 190-191, 193-194; M. Tr. 83, 381-82; RX-11; JX-6.) As to the seven sales for which the amount of notice is less precise, multiple witnesses gave undisputed testimony that Mike-sell's gave Union Stewards "advance notice" of its decision to sell routes before effectuating those sales. (R. Tr. 134, 153, 169, 177, 180, 182-184, 187.) The General Counsel presented no evidence that the Union failed to grieve or demand bargaining over these sales because it did not have sufficient time to do so.[53] Hence, to the extent Mike-sell's was required to provide sufficient notice of its prior route sales so as to "trigger" the Union's duty to request bargaining, ALJ Gollin erred in failing to so find.

D. The ALJ erred in finding that the Union made a bargaining demand that was sufficient to trigger the Company's duty to bargain. (Relates to Exceptions 1, 4, 18, 32-41, 46-52)

It is true that an employer has "the duty to engage in bargaining regarding any and all mandatory bargaining subjects upon the union's request to bargain," and that this "duty to bargain upon request is not affected by an employer's past practice." *Raytheon*, 365 NLRB at *14 (emphasis in original). But a union must request to bargain generally "over the mandatory subject at issue;" it

[53] Even assuming for the sake of argument that the notice was a *fait accompli*, nothing prevented the Union from filing an unfair labor practice charge over the sales, as it did in this case.

is not entitled to bargain on a case-by-case basis, resulting in "one-off" exceptions to an established practice. *Id.* at *25; *see also Shell Oil*, at 287-88 ("The Union's demand to bargain [over an] established practice did not suspend the [employer's] right to maintain its established practice, any more than a demand by the Union to modify the existing wage structure would suspend Respondent's obligation to maintain such wage structure during negotiations.").

Where the Board finds a duty to bargain upon request over an established past practice, the demand has been to bargain over the practice as a whole, as established by the implied contract term itself. *See, e.g.*, *J.H. Allison & Co.,* 70 NLRB No. 35 (1946) (finding employer had duty to bargain with union over wage rates, where employer gave merit wage increase to about 30% of employees and, during contract negotiations that followed, union requested to include new clause in labor agreement concerning its rights with respect to merit increases). Indeed, if selective bargaining were permissible—thereby allowing unions to pick and choose, after-the-fact, which actions of a particular ilk are "acceptable" and which are not—then an employer would have no assurance that it could ever rely on a past practice because the union could simply demand its business decisions be reversed.

To the extent bargaining is deemed required, it was not enough for the Union to demand bargaining over the sale of an individual route after Mike-sell's has already made the decision (and the business arrangements) to sell it. The Union must instead request to bargain over the entire "subject": the practice of selling routes to distributors. The Union could have made this general demand to bargain after Mike-sell's sent the April 27, 2016 letter, announcing an intent to sell unspecified routes. (JX-2.) The Union likewise could have made an overall bargaining demand after any of the individual sales. However, the Union only demanded to bargain over the sale of Routes 104 and 122;[54] it did <u>not</u> demand bargaining over Routes 102, 131, or any of the dozens of routes sold

[54] The Union also demanded to bargain over the decision to sell the Marion route in 2011. (R. Tr. 154, 262; RX-50.)

since the Paolucci Award issued. *See* JD-85-18, pp. 16-17. By seeking selective bargaining, the Union did not propose a "change" to any past practice or term or condition of employment; the Union merely sought an isolated "exception" to the general rule. This request for an "exception" to save two "preferred" routes was insufficient to trigger the duty to bargain about the practice as a whole.

Even assuming the Union had requested to bargain over the entire subject (i.e., the Company's practice of selling routes),[55] the obligation to bargain would only be prospective. Mike-sell's should not be forced to bargain over specific sales already arranged in accordance with past practice. This is supported by the Board's holding in *Raytheon*, where the union requested to schedule future bargaining sessions to discuss the general subject of healthcare; the union did not demand bargaining for a specific healthcare-related decision that was already made. *Id.* at *4; *see also Shell Oil*, at 287-88. Because Mike-sell's was not required to provide notice or an opportunity to bargain before making a decision that comports with its established past practice, it would make little sense to require the Company to negotiate retroactively over its decisions already made. Board law confirms that Mike-sell's has the right and the duty to maintain the status quo—without exception—unless and until the parties reach an impasse or agreement. The duty to bargain over changes in terms and conditions to employment is prospective in nature, so the Supplemental Decision should be reversed.

[55] That the Union knew how to initiate general bargaining over the entire subject (rather than just individual sales of its choosing) is evidenced by the fact that the Union proposed adding the following new contract language in November 2016, after all four of the 2016 route sales had occurred: "Notwithstanding anything contained in this Agreement to the contrary, the Company shall not sell, transfer, or otherwise assign any current routes, in one transaction or a series of transactions, to any other person or entity without the agreement of the Union." (M. Tr. 293-94; RX-4, p. 4.) And when the Union finally did submit this proposal to negotiate over the subject of selling routes, Mike-sell's obliged. Specifically, the Company reviewed and responded to the proposal, declining to adopt the Union's proposed language. The parties have thus far been unable to reach an agreement, but the fact that the Company entertained the Union's request demonstrates that the Company would have, and did, comply with its obligation to bargain upon request over the practice as a whole, once a proper demand for bargaining was made.

E. Even if Mike-sell's had committed the violations alleged, the ALJ's Order to rescind the 2016 sales (and to reassign Routes 102, 104, 122, and 131 to Sales Drivers) should be vacated as unduly burdensome. (Relates to Exceptions 49-51)

The ALJ's Order that Mike-sell's rescind the sales of routes 102, 104, 121, and 131, and reassign those routes to unit drivers, is unduly burdensome and punitive. In *Lear Siegler, Inc.*, 295 NLRB 857 (1989), the Board applied the "unduly burdensome" standard where restoration of the status quo ante was at issue. The Board explained that "[r]equiring [a business] to reopen a demonstrably unprofitable facility might not be found to threaten the survival of the enterprise if it could offset losses from the reopened facility with profits from others; however, in many instances requiring such cross-subsidization (for indefinite periods) might well be found to be unduly burdensome." *Id.* at 861. Hence, where an employer can show that a proposed remedy would impose an undue financial burden, the proposed remedy should not be enforced. *See, e.g.*, *NLRB v. G & T Terminal Packaging Co.,* 246 F.3d 103, 121-22 (2d Cir. 2001) (declining to enforce order requiring the employer to restore its potato packaging operation and reinstate 22 discriminatees).[56]

Just as in the above-referenced cases, the ALJ's Order requiring Mike-sell's to rescind its sales to independent distributors and reallocate money into rebuilding its in-house distribution network would be punitive rather than remedial, imposing an undue hardship on both the Company and its distributors. Not only does the Order require Mike-sell's to interfere with (and commit breach of) its contractual relationships with distributors, but it also requires the reacquisition of all equipment necessary for servicing the four routes, including delivery vans, hand-held scanners, and other

[56] *NLRB v. Spec. Mine Servs., Inc.*, 11 F.3d 88, 89 (7th Cir. 1993) (declining to enforce order to resume operations without subcontracting where employer documented the financial burden by establishing that subcontractor supplied products for less than the cost of making them in-house, and where employer contended that other operational costs not only supported original decision to subcontract, but also established that taking work in-house would be unusually expensive); *NLRB v. Townhouse T.V. & Appliances, Inc.*, 531 F.2d 826, 831-32 (7th Cir. 1976) (declining to enforce restoration order where employer had subcontracted for business reasons, as well as for anti-union considerations, and capital outlay to reacquire trucks, plus costs such as insurance, maintenance, fuel, and taxes, would entail considerable burdens to relatively small company); *NLRB v. Major*, 296 F.2d 446 (7th Cir. 1961) (declining to enforce order to resume operations on the ground that it required such a large capital outlay by employer that it was punitive rather than remedial).

expensive tools and equipment that have already been disposed. (M. Tr. 487-491, 539-53, 590-94; RX-17.) The Order and Remedy is especially harsh, considering that—after liquidating its assets—Mike-sell's reallocated that money into the design and installation of a new custom-made overhead conveyor, in order to bolster its manufacturing division. (M. Tr. 538-42, 548-55; RX-27; RX-28.) Without the sale of Routes 102, 104, 122, and 131—and the liquidation of the assets used to service them—it is unclear whether Mike-sell's could afford to finish pay for the overhead conveyor, the purchase of which can no longer be cancelled or returned. (M. Tr. 553.)

Moreover, requiring Mike-sell's to rescind the sales would have devastating consequences on the overall efficiency and competitiveness of the Company. The very purpose of the route sales to begin with was to help solve the economic loss resulting from increased competition from larger companies that have the ability to price smaller concerns out of business. (M. Tr. 234-36, 238, 243-48, 305, 359; RX-15.) Rescinding the sales would effectively force Mike-sell's to reinvest in a losing venture and would risk losing the business of potential distributors willing to purchase routes in the future (irrespective of any bargaining obligations). (M. Tr. 235-36, 243-47, 411, 543, 834-35.) In addition, Mike-sell's does not have the Sales Drivers on staff to service the four routes sold in 2016 because—as indicated previously—the sales were timed in connection with employee retirements. (M. Tr. 377-78, 408-09, 945-46.) Thus, bringing the four routes back in-house will result in a situation for which Mike-sell's is understaffed and unprepared, thereby increasing the likelihood of customer service problems. (M. Tr. 565.)

F. Even if Mike-sell's had committed the violations alleged, the ALJ's order to produce the requested information should be vacated to the extent such information does not exist, as well as to the extent that the Union has already received responsive information. (Relates to Exceptions 42, 47-51)

In addition, the ALJ's order that Mike-sell's provide the Union with the information it requested is improper and unwarranted. An information request may be denied "if its compilation would be unduly burdensome or if the employer's interest in its confidentiality outweighs the union's

interest. *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 956-57 (10th Cir. 1982) (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Shell Oil Co. v. NLRB*, 457 F.2d 615 (9th Cir. 1972); *Emeryville Research Center, Shell Dev. Co. v. NLRB*, 441 F.2d 880 (9th Cir. 1971)). Here, the undisputed facts reflect that Mike-sell's does not track the profitability of individual routes.[57] (M. Tr. 305-06, 319-20, 331, 340, 354-55, 360, 365, 370-71, 374, 424-25; R. Tr. 44, 92-93, 129, 212-13, 231-37, 260.) As a result, compiling the requested information would be unduly burdensome, because it would require the Company to track data and perform calculations that it does not ordinarily prepare or rely upon in the regular course of business.

The remedy is also unwarranted because the Union already has access to most—if not all—of the responsive information that actually exists. *See Borgess Med. Ctr. and Michigan Nurses Assn.*, 342 NLRB 1105, 1106-07 (2004) (declining to order employer to permit union to view requested incident reports where union no longer had ongoing need for information requested); *Westinghouse Electric Corp.*, 304 NLRB 703 fn. 1, 709 (1991) (no affirmative order to produce requested information in light of judge's finding that only demonstrated relevance of information was in relation to concluded arbitration that arbitrator was without authority to reopen); *cf. Postal Service*, 307 NLRB 429 fn. 2 (1992) (limiting denial of affirmative order to case where there was showing that only possible relevance of requested information was to closed arbitration that could not be reopened).

Here, the vast majority of documents requested by the Union were introduced as exhibits in either the 10(j) hearing or the ALJ merits hearing, with copies of all exhibits provided to both the General Counsel and the Union. (M. Tr. 410-13, Rejected RX-13, RX-14, RX-15.) *See also* Exhibit 3 entered at 10(j) hearing before Judge Thomas M. Rose on May 12, 2017, resulting in denial of the

[57] Mike-sell's was forced by the General Counsel during her pretrial investigation to prepare time-consuming calculations for the four routes sold in 2016, which reflected that the four routes at issue were in fact not profitable. As Mr. Kazer testified, in 2015, one of the routes broke even while the other three routes saw significant losses. (M. Tr. 410-12, 425-26, 473-75; RX-15.) *See also* Exhibit 3 entered at 10(j) hearing before Judge Thomas M. Rose on May 12, 2017, resulting in denial of the 10(j) injunction at *NLRB v. Mike-sell's Potato Chip Co.,* 254 F. Supp. 3d 969 (S.D. Ohio 2017).

10(j) injunction at *NLRB v. Mike-sell's Potato Chip Co.,* 254 F. Supp. 3d 969 (S.D. Ohio 2017). According, the Union's request is mostly—if not entirely—moot, and the order should be denied.

G. The ALJ erred in excluding Respondent's Exhibits 53 and 54. (Relates to Exception 52)

At the remand hearing, the ALJ improperly excluded RX-53, a grievance filed by Gary Gates, who is a warehouse worker and Union Steward.[58] (R. Tr. 294.) The grievance was filed after workers observed Chris Helm ("Helm"), of Helm Distributing, loading product into his truck at the Dayton warehouse.[59] (R. Tr. 295.) The grievance challenges the Company's practice of allowing Helm to load his own truck for distribution. (R. Tr. 295-96; RX. 53.) Mike-sell's communicated with Union Business Agent Maddy about this grievance, explaining via email (as part of the grievance response) that Helm had been loading out of the Dayton warehouse for over a year, and had continued doing so after Mike-sell's re-sold him the Greenville routes that were relinquished by Gaudio Distributing. (R. Tr. 297; M. Tr. 326-27, 330; RX-53, p. 2.) Nevertheless, even after learning that Mike-sell's had re-sold the Greenville routes to Helm Distributing, the Union never filed a grievance, information request, or unfair labor practice charge to challenge those re-sales.

Respondent attempted to introduce RX-53 to show that Mike-sell's did, in fact, put the Union on-notice of the Greenville routes being re-sold to Helm Distributing—contrary to ALJ Gollin's findings. (R. Tr. 299-300; RX-53, p. 2.) The fact that the Union learned about the re-sales after they occurred did not preclude it from filing a grievance or unfair labor practice charge. Rather, the time for filing the grievance or charge would have begun to run at the time the Union learned of the re-sale. And yet, the Union never proceeded to file an such grievance. Respondent excepts to the ALJ's exclusion of RX-53, as well as to ALJ Gollin's finding that Mike-sell's never communicated the re-

[58] The warehouse workers are represented by the same Union as the Sales Drivers, but in different bargaining units.

[59] Helms Distributing had purchased certain routes from the Company—some that had been sold for the first time, and some that were re-sold for a second time—whereas ALJ Gollin found no evidence that the Union ever learned that certain Company routes were re-sold.

sale of the Greenville routes. The testimony reflects only that no "formal notification" was given, and ALJ Gollin improperly rejected documentary evidence that would have demonstrated the re-sale was communicated to the Union, in writing, after-the-fact.

In addition, the ALJ improperly excluded RX-54, which is a list of factual stipulations signed by the Company's counsel and the Union's counsel. (RX-54.) Before the remand hearing, all parties agreed to enter into stipulations regarding undisputed facts related to the sale of prior routes. (R. Tr. 14.) In fact, the General Counsel represented to both the Company and the Union that she did not possess the requisite knowledge to object or consent to any factual stipulations and would therefore agree to enter the stipulation if the Union confirmed the facts set forth were true. (R. Tr. 14.) The Union did admit the truth of the factual stipulations, as demonstrated by the signature of the Union's counsel. (R. Tr. 14.) Nevertheless, immediately before the remand hearing began, the General counsel suddenly refused to sign on to the stipulations entered by the Company and the Union. (R. Tr. 15.) The General Counsel conceded she did not have any evidence to refute the factual stipulations entered by the other parties, nor did she dispute previously agreeing to accept the stipulations if the Union confirmed their accuracy. (R. Tr. 14-15.) As a result of the General Counsel's antics, Respondent attempted to introduce the signed stipulations into evidence, in order to show the Company's and the Union's agreement as to certain material facts. (R. Tr. 301-02.) The undersigned counsel attempted to introduced them through Wille, the Company's former Human Resources Director who had knowledge of all the underlying fact, had helped prepare the stipulations, and was quite familiar with the signature of Union counsel. (R. Tr. 302-03, 305.) Nevertheless, ALJ refused to accept the stipulations entered by the Company and the Union as a result of the General Counsel's last-minute refusal to sign on to them, despite that the only two parties who actually possessed the relevant knowledge of the facts had already entered the stipulations. (R. Tr. 16-17, 305-06.)

III. CONCLUSION

For the foregoing reasons, Mike-sell's Exceptions should be granted, and the ALJ's Decision should be reversed as to the issues raised in the Company's Exceptions.

Dated: January 24, 2019

Respectfully submitted,

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WORD INDEX

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2019, the foregoing was served via electronic filing through the National Labor Relations Board website (www.nlrb.gov) to the National Labor Relations Board's Office of the Executive Secretary, located at 1015 Half Street SE, Washington, DC 20570-0001, with additional service copies sent as follows:

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